Supreme Court, U.S.
FILED
JUL 19 1996
CLERK

No. 95-1425

In The

Supreme Court of the United States

October Term, 1995

LUCIOUS ABRAMS, JR., REV. G. L. AVERY, WILLIAM GARY CHAMBERS, SR., and KAREN WATSON,

Appellants,

v.

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia (Three Judge Court)

BRIEF OF APPELLANTS

ELAINE R. JONES
Director-Counsel
NORMAN J. CHACHKIN
JACQUELINE BERRIEN
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GERALD R. WEBER
American Civil Liberties Union of Georgia
142 Mitchell Street, S.W.
Suite 301
Atlanta, Georgia 30303
(404) 523-6201

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
MAHA ZAKI
MARY WYCKOFF
American Civil Liberties Union Foundation, Inc.
44 Forsyth Street
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

Attorneys for Appellants

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the district court, in drawing a remedial congressional redistricting plan, erred in disregarding the state's legislative policy choices and making changes that were not minimally necessary to cure the constitutional defects in the existing plan?

2. Whether the court ordered plan, which fragmented the black population in two majority black districts and dispersed it throughout the state, dilutes minority voting strength in violation of Section 2 of the Voting Rights Act?

3. Whether the court ordered plan, which reduced the number of majority-minority districts from three to one, is retrogressive under Section 5 of the Voting Rights Act?

4. Whether the court ordered plan, which contains unnecessary population deviations, complies with the one person, one vote standard of Article I, Section 2 of the Constitution?

5. Whether the court erred in peremptorily barring private intervention to defend the constitutionality of the Second Congressional District although state officials did not seriously contest plaintiffs' claims of invalidity nor did they or the United States appeal the court's finding that the Second District was unconstitutional?

PARTIES TO THE PROCEEDING

The appellants are Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr., and Karen Watson. The appellees are Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, and George Seaton. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. Max Cleland has been succeeded as Secretary of State by Lewis Massey. The United States of America was a defendant intervenor.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

A. The Parties Below 2

B. *Miller v. Johnson* and Its Aftermath 2

C. The Remedy Phase 5

1. Appellants' Proposed Plans 7

2. Other Proposed Plans 14

D. History of Discrimination 14

E. Racial Bloc Voting 16

F. The Decision of the District Court 19

Summary of Argument 24

Argument 27

I. The District Court Abused Its Equitable Powers 27

A. Ignoring District Cores 31

B. Maximum Disruption 34

C. Destroying Majority Black Districts 34

D. Unnecessary Speculation 37

TABLE OF CONTENTS – Continued

Page

II. The Court's Plan Violates Section 2 40

A. No Deference Is Due the Court's Ruling .. 44

III. The Plan Is Retrogressive in Violation of Section 5 46

IV. The Plan Does not Comply with One Person, One Vote 48

Conclusion 50

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. Johnson, 116 S.Ct. 899 (1996)..... 24

Abrams v. Johnson, No. 94-797..... 15, 17, 19, 21

Abrams v. Johnson, A-982 24

Beer v. United States, 425 U.S. 130 (1976) 46, 48

Burton v. Sheheen, 793 F.Supp. 1329 (D.S.C. 1992) 49

Bush v. Vera, 64 U.S.L.W. 4452 (1996) 38, 42

Chapman v. Meier, 420 U.S. 1 (1975)..... 28

City of Lockhart v. United States, 460 U.S. 125 (1983) 46, 47

Clark v. Roemer, 500 U.S. 646 (1991)..... 48

Connor v. Finch, 431 U.S. 407 (1977)..... 28

DeWitt v. Wilson, 856 F.Supp. 1409 (E.D.Cal. 1994) 38

DeWitt v. Wilson, 115 S.Ct. 2637 (1995)..... 38

Edge v. Sumter County School District, 775 F.2d 1509 (11th Cir. 1985)..... 43

Growe v. Emison, 113 S.Ct. 1075 (1993) 28

Hastert v. State Board of Elections, 777 F.Supp. 634 (N.D.Ill. 1991) 49

Holder v. Hall, 114 S.Ct. 2581 (1994)..... 47

Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982) 45

Johnson v. De Grandy, 114 S.Ct. 2647 (1994)..... 44

Johnson v. Miller, Civ. No. CV194-008 (S.D.Ga.) 3

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Miller, 864 F.Supp. 1354 (S.D.Ga. 1994) *passim*

Jordan v. Winter, 541 F.Supp. 1135 (N.D.Miss. 1982) 43

Karcher v. Daggett, 462 U.S. 725 (1983) 47, 48, 49

McDaniel v. Sanchez, 452 U.S. 130 (1981) 46

Miller v. Johnson, No. 94-631 35

Miller v. Johnson, 115 S.Ct. 2475 (1995) ..... *passim*

Milliken v. Bradley, 418 U.S. 717 (1974) 27

Missouri v. Jenkins, 115 S.Ct. 2038 (1995) 27

Roman v. Sincock, 377 U.S. 695 (1964) 28, 33, 34

Shaw v. Reno, 113 S.Ct. 2816 (1993) 31

SRAC v. Theodore, No. 92-155 (S.Ct.) 43

SRAC v. Theodore, 113 S.Ct. 2954 (1993) 43, 44

Thornburg v. Gingles, 478 U.S. 30 (1986) 41, 42, 43, 44

United States v. Johnson, No. 95-1460 ..... 14, 49

Upham v. Seamon, 456 U.S. 37 (1982) 28, 29, 30, 37, 39, 48

Voinovich v. Quilter, 113 S.Ct. 1149 (1993) 42

Whitcomb v. Chavis, 403 U.S. 124 (1971) 27, 33, 39

White v. Weiser, 412 U.S. 783 (1973) 28, 29, 33

Winter v. Brooks, 461 U.S. 921 (1983) 43

Wise v. Lipscomb, 437 U.S. 535 (1978) 48

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 45

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

Article I, Section 2, Constitution of the United States 1, 48

Article I, Section 4, cl. 1, Constitution of the United States 28

STATUTORY PROVISIONS:

28 U.S.C. §1253 1

42 U.S.C. §1973, Section 2 of the Voting Rights Act 1, 40, 42, 43, 45

42 U.S.C. §1973(b), Section 2(b) of the Voting Rights Act 40

42 U.S.C. §1973c, Section 5 of the Voting Rights Act, ... 1, 46, 48

OTHER AUTHORITIES:

Ga. Laws 1995, Ex. Sess., p. 1 2

S.Rep. No. 295, 94th Cong. 18-9 (1975) 46

S.Rep. No. 417, 97th Cong., 2d Sess. 28-9 (1982) 40, 41

Mike Christensen, "Reactions to the plan are all over the map," Atlanta Journal Constitution, December 14, 1995 29

Jeff Dickerson, "At Christmas, black party loyalty doesn't pay off," The Atlanta Journal, December 20, 1995 29

Kevin Merida, "ACLU to Appeal Decision Remapping Ga. Districts," Washington Post, December 15, 1995 29

TABLE OF AUTHORITIES – Continued

Page

Jeff Dickerson, "At Christmas, black party loyalty doesn't pay off," The Atlanta Journal, December 20, 1995 29

Kevin Merida, "ACLU to Appeal Decision Remapping Ga. Districts," Washington Post, December 15, 1995 29

OPINIONS BELOW

The December 13, 1995 opinion of the three-judge court for the Southern District of Georgia implementing a court ordered redistricting plan for Georgia's congressional districts is unreported and appears at J.S.App. 1. The August 22, 1995 order of the district court denying intervention to defend the constitutionality of Georgia's Second Congressional District is unreported and appears at J.S.App. 42. The January 8, 1996 order of the district court denying appellants' motion for a hearing and reconsideration is unreported and appears at J.S.App. 44.

JURISDICTION

The opinion and order of the three-judge court for the Southern District of Georgia was entered on December 13, 1995. Appellants filed their notice of appeal on January 11, 1996. J.S.App. 46. Probable jurisdiction was noted on May 20, 1996. 64 U.S.L.W. 3773. The jurisdiction of this Court is invoked under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case are Article I, Section 2 of the Constitution of the United States, and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§1973 and 1973c, the pertinent texts of which are set out at J.S.App. 49-52.

STATEMENT OF THE CASE

A. The Parties Below. Appellants, who were defendant intervenors below ("Abrams intervenors"), are a group of black and white registered voters and residents of Georgia's Eleventh Congressional District. Appellees, plaintiffs below, are white residents of Georgia who challenged the state's 1990 congressional redistricting on constitutional grounds. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. Max Cleland has been succeeded as Secretary of State by Lewis Massey. The United States of America was also a defendant intervenor.

B. *Miller v. Johnson* and Its Aftermath. In *Miller v. Johnson*, 115 S.Ct. 2475 (1995), this Court held that Georgia's Eleventh Congressional District was unconstitutional because the state, absent a compelling reason for doing so, had relied upon race as a predominant factor in redistricting in substantial disregard of customary and traditional districting practices. The redistricting plan contained three majority black districts out of eleven, the Second, the Fifth, and the Eleventh, but only the Eleventh was challenged in the district court. *Johnson v. Miller*, 864 F.Supp. 1354 (S.D.Ga. 1994) (*Johnson I*), *aff'd sub nom. Miller v. Johnson*. Blacks are 27% of the population of the state of Georgia. J.S.App. 39.

After the decision in *Miller v. Johnson* the Governor called the general assembly into special session to redistrict the state's congressional districts. Ga. Laws 1995, Ex. Sess., p. 1. The three-judge court conducted a hearing on

remand on August 22, 1995. It ruled that "Georgia has until October 15th to enact a congressional reapportionment plan and have it precleared before this Court will become vigorously active in handling the matter of remedy." *Johnson v. Miller*, Civ. No. CV194-008 (S.D.Ga.) Transcript of Hearing, August 22, 1995, p. 110 ("T., Aug. 22, 1995").

The court also allowed the plaintiffs to amend their complaint to add additional plaintiffs and to challenge the constitutionality of the state's majority black Second Congressional District. The court refused, however, to allow appellants to defend the constitutionality of the Second District and barred in advance any further intervention by private parties. The court ruled that:

> The Abrams intervenors will not participate . . . in the evidentiary proceedings on the matter of the constitutionality of the Second Congressional District of Georgia. It is our view that there is no need for intervenors in this litigation. The record is that the State of Georgia and its elected officials will defend the congressional districts that were enacted by the legislature to the full extent of the law. We have seen that and we expect that they will do that again and therefore we see no need to have intervenors.

J.S.App. 42-3.

The general assembly remained in special session for approximately a month. Defendant Murphy took the position that "you ought to have two majority minority seats in Georgia." *Johnson v. Miller*, Trial Transcript, October 30, 1995, p. 433 (Testimony of Linda Meggers) ("T., Oct. 30, 1995"). The house, in fact, adopted a plan at the

special session that included two majority black districts, the Fifth located in the metropolitan Atlanta area and which had a 51.3% black voting age population (BVAP), and the Eleventh (50.1% BVAP) located in the east central part of the state. Status Report, Aug. 29, 1995 (Plan MSLSS, August 25, 1995).

The senate passed a plan that contained only one majority black district, the Fifth (51.5% BVAP). Status Report of Defendants Miller, Howard, and Cleland. The house and senate were unable to resolve their differences in conference committee, and on September 13, 1995 the defendants notified the court that the general assembly had been unable to enact a congressional redistricting plan and had adjourned. J.S.App. 2.

The court held a trial on the issue of the constitutionality of the Second Congressional district on October 30, 1995.[1] Immediately after the trial, the court conducted a hearing as to remedy instructing the parties "to assume, arguendo at least, that the Second District may be declared unconstitutional." T., Oct. 30, 1995, p. 5.

Prior to the October 30, 1995 trial, defendant Murphy stipulated that the Second District "fails the constitutionality test as articulated by the Supreme Court." Joint Stipulations of Fact and Statement of Issues Pertaining to Plaintiffs' Challenge to Georgia's Second Congressional District, stip. 108. The remaining state defendants did not vigorously defend the constitutionality of the Second District.

---

[1] Appellants did not participate in that trial.

The state did not argue that a majority black Second District was needed to eliminate the effects of past discrimination in voting, nor to comply with Section 2 of the Voting Rights Act. *Johnson v. Miller*, Order of December 1, 1995, slip. op. at 10, 12 ("Order, Dec. 1, 1995"). By their own admission, "the State Defendants presented no witnesses and asked no questions of other witnesses at the liability hearing." Response of Defendants Miller, Howard and Cleland to 'Plaintiffs' Second Interim Petition for Fees and Expenses,' p. 5.

The state's defense was that the Second District differed from the Eleventh because the Second had always existed in the southwestern corner of the State, there was a greater community of interest in the Second District, and the Second District had a lower percentage of black voters. Order, Dec. 1, 1995, slip. op. at 10-1. The court rejected these defenses concluding that "race was the overriding and predominant motivating factor in designing the Second Congressional District," and the state "fails to meet its burden under the strict scrutiny analysis." *Id.* at 12.

The United States did not contest liability. The district court found that "[t]he Department of Justice contended that, as a matter of law, the Second District was unconstitutional" in light of *Miller v. Johnson*. Order, Dec. 1, 1995, slip op. at 3 n.1.

The three-judge court declared the Second District unconstitutional on December 1, 1995. J.S.App. 1-2. None of the state defendants appealed the decision.

C. The Remedy Phase. Prior to the October 30, 1995 trial, the court entered two orders. The first instructed the

parties to submit "a plan that makes the least changes, in terms of line drawing, in Georgia's present congressional plan but at the same time brings the Eleventh and the Second Congressional Districts . . . into compliance with the United States Constitution." Order, October 17, 1995, slip op. at 2-3. The second order directed the parties to "further submit a plan based on the first plan that Georgia submitted to the Department of Justice [following the 1990 census] for preclearance." Order, October 20, 1995, slip op. at 1. Despite the submission of least-change alternatives by the parties and *amici*, the district court completely redrew the congressional map of Georgia.

State defendants Miller, Howard, and Cleland refused to submit or sponsor any plans, advising the court that:

> the Defendants do not know what the Constitution now requires in terms of remedy. They do not have a view of what plan might satisfy the particular criteria set forth in the Court's orders. For that reason, they are unable to submit what the Court directs.

Submission of Defendants Miller, Cleland and Howard in Connection with the Issue of Remedy, p. 2. Defendant Howard, however, provided the court a copy of the redistricting plan that had passed the senate. *Id.*

Defendant Murphy submitted a plan which he said "represents only his own opinion and beliefs as an individual public officer and not necessarily those of any other member of the House of Representatives or the House Democratic Caucus." Defendant Murphy's Remedy Submission in Response to Orders of October 17 and 20, 1995, p. 3. His plan created only one majority black

district, the Fifth (54% VAP). The Second District had a black VAP of 36.8%, and the Eleventh District a black VAP of 36.1%. *Id.*

Appellants, the United States, and *amici* incumbent members of Congress (including Representatives John Lewis and Newt Gingrich) submitted various remedial plans. They are discussed below.

1. Appellants' Proposed Plans. Appellants submitted four plans prepared by their expert Selwyn Carter.[2] One of the plans was a least-change plan (referred to as ACLU1A), submitted at the direction of the district court, designed to cure the constitutional defects in the existing plan but at the same time make no more changes than were necessary to accomplish that purpose. J.App.* 198-99.

In *Miller v. Johnson* this Court identified the manner in which the state had unconstitutionally subordinated its traditional redistricting principles to race in the construction of the Eleventh District, *i.e.*, "by extending the Eleventh to include the black populations in Savannah;" by splitting "Effingham and Chatham Counties . . . to make way for the Savannah extension, which itself split the City of Savannah;" by "splitting eight counties and five municipalities along the way;" and, by using "narrow corridors" to link "the black neighborhoods in Augusta, Savannah and southern DeKalb County." 115 S.Ct. at 2484. The district court, in its December 1, 1995 opinion,

---

[2] Mr. Carter, a specialist in redistricting, is the director of voting rights programs for the Southern Regional Council, a biracial organization in Atlanta, Georgia. T., Oct. 30, 1995, p. 294.

identified features of the Second District which it found rendered it unconstitutional, *i.e.*, "the sole reason for splitting precincts was racial and . . . the predominant reason for splitting . . . counties and cities was racial as well;" and, the district "makes use of narrow land bridges to connect parts of the district and involves a number of irregular appendages." Order, Dec. 1, 1995, slip op. at 6.

In preparing appellants' least-change plan, Mr. Carter proceeded in light of this Court's findings with regard to the Eleventh District and in anticipation of the findings of the district court with regard to the Second District. His "overriding methodology . . . was to correct the constitutional defects in the Eleventh Congressional District and assume that the Second Congressional District was unconstitutional and correct . . . [the] assumed defect in that district and to maintain the remaining districts with as little change as possible." J.App. 161. He also applied the redistricting principles embodied in the state's prior plans, particularly the 1970 and 1980 plans. Those principles included constructing districts with a substantial number of counties, and which contained both rural and urban areas. J.App. 165.

Mr. Carter removed the extensions of the Eleventh District through Effingham and Chatham Counties because they were identified by the Court as being "examples of racial gerrymandering of the district." J.App. 161. He regularized the configuration of Richmond County "by bringing in a considerable number of white voters previously in the Tenth District and transferring them to the Eleventh District." J.App. 161. Richmond County, an urban county, remained split under the least-change plan but the split was not along racial lines. *Id.*

He reaggregated Baldwin, Twiggs, and Wilkes Counties, portions of which had been placed in the Eleventh District, and placed them in other districts. The reason for the reaggregation was to "restore the integrity of those rural political subdivisions and make the integrity of those subdivisions predominant. Clearly here . . . an attempt was made to draw a plan in which race was not the predominant factor." J.App. 162.

He eliminated the narrow land corridor through Henry County and included the county in its entirety in the Eleventh District. J.App. 166. He also removed portions of DeKalb County from the Fifth District and placed them in the Eleventh District so that the boundary between the Fifth and the Eleventh Districts would be the county line. J.App. 162-63, 170.

Under appellants' least-change plan, the Eleventh District has a black VAP of 52.8%. J.App. 198. It is composed of 14 whole counties, and only the urban counties of Richmond and DeKalb are split. J.App. 163.

A number of changes were similarly made in the Second District. In *Miller*, this Court noted the criticism of the district court that "[t]he black population of Meriwether County was gouged out of the Third District and attached to the Second District by the narrowest of land bridges." 115 S.Ct. at 2484. Accordingly, Mr. Carter reaggregated Meriwether County and placed the county in its entirety in the Seventh District. J.App. 174. Other counties which had been split by the Second District – Lowndes, Colquitt, Dougherty, Lee, Crisp, Dooly, Houston, Bleckley, Twiggs, and Crawford – were also reaggregated.

Lowndes, Colquitt, Lee, Crisp, Houston, Bleckley, and Twiggs were placed in the Eighth and Dougherty, Dooly, and Crawford were placed in the Second. Again, the reason for the reaggregation was to restore the integrity of the rural counties and make their preservation a predominant redistricting criterion. J.App. 168.

In order to comply with one person, one vote, Mr. Carter moved Talbot County from the Second District to the Third. J.App. 167, 170. The only counties split by the Second District are Bibb and Muscogee, both of which are urban. The county governments of both counties passed resolutions requesting that the two counties be split under any remedial plan to increase their representation in Congress, a non-racial factor which Mr. Carter took into account in drawing the Second District. J.App. 169.

In splitting Bibb County, Mr. Carter sought to eliminate a narrow land bridge into the city of Macon by including a substantial number of white residents of the city in the Second District. J.App. 168. The existing Second District also contains other urban areas, *i.e.*, Columbus and Valdosta. Because the state "had historically linked rural and urban areas together to form congressional districts," he kept these areas in appellants' least change plan. J.App. 168, 170.

The changes in the remaining districts were those minimally required by the changes in the Second and Eleventh Districts. Because Effingham and Chatham Counties were placed in the First District, Montgomery, Tattnall, and Toombs Counties were taken out of the First

and placed in the Eighth District to comply with one person, one vote. Clinch County was moved from the Eighth to the First, also to comply with one person, one vote. J.App. 166-67. There are no split counties in the First District. *Id.*

Baldwin County was reaggregated and added to the Third District, together with Talbot County, to comply with one person, one vote. J.App. 170. Portions of Clayton County that had been in the Third were, as noted above, placed in the Fifth District to comply with one person, one vote, and to avoid retrogression. J.App. 170. There are eleven intact counties in the Third, and the only split counties are the urban counties of Bibb, Muscogee, and Clayton. J.App. 170-71. Maintaining the integrity of counties was the predominant factor in the construction of the district, as it was in the construction of the plan as a whole. J.App. 171.

Changes in the Fourth District were minimal. They involved switching precincts between the Fourth and Tenth Districts and precinct changes in DeKalb County to comply with one person, one vote. J.App. 171.

In the Fifth District, portions of Clayton County were added to compensate for the portions of DeKalb County previously in the Fifth that were moved to the Eleventh to make the DeKalb/Fulton County line the boundary between the two districts. J.App. 172-73. The part of Clayton County that was added contained enough black population to avoid retrogression in the majority black Fifth District, but was whiter overall than the part of DeKalb County that was taken out. J.App. 170, 173. Portions of northern Fulton County were moved to the

Fourth District to comply with one person, one vote, and also to avoid retrogression in the Fifth District. J.App. 173.

The changes in the Sixth District were also minor. They involved a handful of precinct changes in Gwinnett and Cobb Counties to comply with one person, one vote. J.App. 173.

The principal change in the Seventh was the addition of Meriwether County from the Second District, along with minor precinct changes involving Cobb County, again to comply with one person, one vote. J.App. 174.

In the Eighth District changes were made because of changes in other districts, to comply with one person, one vote, and to keep counties intact. J.App. 174-75. Montgomery, Toombs, and Tattnall Counties, formerly in the First District, were added to the Eighth. Clinch County was excluded, as was the previous extension into Bibb County. J.App. 175.

There were no changes in the Ninth District. J.App. 175. In the Tenth District, Wilkes County was reaggregated and added. A portion of Richmond County, which was heavily white, was moved to the Eleventh District, and there were a few precinct changes in Gwinnett County. All of these changes were made to comply with one person, one vote. J.App. 175-76.

None of the rural counties outside the metropolitan Atlanta area were split in the least-change plan. J.App. 176. A total of nine counties were split, all in urban areas of the state. The court ordered plan split six urban counties. J.S.App. 15. As the district court found, "[g]iven

the population density of those counties, it would be impossible to avoid splitting any counties." J.S.App. 15 n.12.

Under appellants' least-change plan the Fifth District contained a black VAP of 54.3%, and the Second a black VAP of 45.5%. All the districts were contiguous, were based upon the state's traditional redistricting principles, were reasonably compact, and cured the constitutional defects identified by this Court.

The total deviation among districts in appellants' least-change plan was 0.93%, but the deviation could have been lowered with the splitting of additional counties. According to Mr. Carter, "if you draw a plan at a lower level of geography you can get more precise and bring the deviations down to almost zero if you want." J.App. 164.

Appellants also tendered three other plans. J.App. 141-51. One of the plans, designated as Plan A, contained three majority black districts, had a total deviation among districts of 0.29%, but split more counties that ACLU1A.[3] J.App. 194-95. Plan C, which contained two majority black districts, split fewer counties than Plan A but as a result contained a greater total deviation, *i.e.*, 0.99%. J.App. 197.

---

[3] In preparing the joint appendix, appellants discovered that in Plan A a small area in the Ninth District was misallocated to the Tenth District. The misallocation can be easily corrected and the correction does not affect the total deviation among districts.

2. Other Proposed Plans. A plan containing two majority black districts, known as Amicus R, was submitted by Congressmen John Lewis and Newt Gingrich. J.App. 204. It made minimal changes in the First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Districts, and only those required to comply with one person, one vote, and cure the constitutional defects identified in the Second and Eleventh Districts. T., Oct. 30, 1995, pp. 356-57. Counties were reaggregated (seven remained split) and appendages were removed. The Amicus R plan was also designed to be a minimal disruption plan in the sense that it did not create "any incumbent contest and it leaves an identifiable representative in each district." T., Oct. 30, 1995, p. 360. The plan was a "consensus" plan and had the support of ten of the eleven members of the state's congressional delegation. T., Oct. 30, 1995, p. 364.

The United States also submitted a plan, known as the Illustrative Plan, to show that a remedial plan could be drawn which created two compact majority black districts and contained minimal population deviations. *United States v. Johnson*, No. 95-1460, J.S.App. 44a. The plan split only two counties outside the metropolitan Atlanta area, Bibb and Muscogee, and contained a total deviation of 0.19%, the lowest deviation of any of the plans submitted to the district court. The black VAP in the Second District was 42%, the black VAP in the Fifth District was 53.7%, and the black VAP in the Eleventh District was 51%. *United States v. Johnson*, J.S.App. 45a.

D. History of Discrimination. The record of the trial in *Johnson I* involving the Eleventh District was made part of the record of the trial involving the Second District. Order, Dec. 1, 1995, slip op. at 4 n.2. In *Johnson I* the

district court found that the history of discrimination in voting and other areas "against black people in the State of Georgia need not be presented for purposes of this case." *Abrams v. Johnson*, No. 94-797, J.S.App. 119; *Johnson I*, Trial Transcript, Volume V, p. 142 (*Johnson I*, T.Vol.). The court took judicial notice that:

> Georgia's history on voting rights includes discrimination against black citizens. From the state's first Constitution – which barred blacks from voting altogether – *through recent times*, the state has employed various means of destroying or diluting black voting strength. For example, literacy tests (enacted as late as 1958) and property requirements were early means of excluding large numbers of blacks from the voting process. Also, white primaries unconstitutionally prevented blacks from voting in primary elections at the state and county level.
>
> Even after black citizens were provided access to voting, the state used various means to minimize their voting power. For example, until 1962 the county unit system was used to undermine the voting strength of counties with large black populations. Congressional districts have been drawn in the past to discriminate against black citizens by minimizing their voting potential. State plans discriminated by packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts.

Abrams v. Johnson, No. 94-797, J.S.App. 119-20 (emphasis added).[4] *See also Miller v. Johnson*, 115 S.Ct. at 2500-02

---

[4] This history and its continuing effects are set out in greater detail in the stipulations of the parties. *See, e.g., Johnson*

(noting the history of discrimination and denial of "equal voting rights" in Georgia) (Ginsburg, J., dissenting).

E. Racial Bloc Voting. There was substantial evidence of racial bloc voting. The experts who testified were in agreement that voting in Georgia is racially polarized. Dr. Allan Lichtman, an expert for the United States, examined more than 300 elections spanning an approximately 20-year period. *Johnson I*, T.Vol.V,200. He used the standard statistical techniques of ecological regression and extreme case analysis, and examined four sets, or levels, of black/white contests: (1) county level contests throughout the state; (2) county level contests within the Eleventh and Second Districts; (3) six statewide elections partitioned within the boundaries of the Eleventh and Second Districts; and, (4) the 1992 Eleventh and Second District elections. *Johnson I*, Department of Justice Exhibits 24, 41 (*Johnson I*, DOJ Ex.); T.Vol.V,199.

As for level one, Dr. Lichtman's analysis showed "strong" patterns of racial bloc voting, with blacks and whites voting "overwhelmingly" for candidates of their own race. *Johnson I*, DOJ Ex. 24 at 7-8. Level two and three analysis also showed "strong" patterns of racial bloc voting. *Id.* at 8-9; T.Vol.V,202-03. In five of the six statewide contests in the Eleventh District, at least 89% of

---

I, Stips. 5 (whites registered in 1992 at 70.2% of voting age population; blacks at 59.8%), 76-103 (detailing the history of discrimination in voting), 104-129 (describing segregation in educational institutions), 130-134 (noting other forms of racial discrimination), 135-55 (stipulating to racial disparities in income, education, unemployment, and poverty status). Abrams v. Johnson, No. 94-797, J.App. 9-33.

blacks voted for black candidates, and at least 74% of whites voted for white candidates. *Johnson I*, DOJ Ex. 24, at 9. The exception to the pattern was the 1992 Democratic primary for labor commissioner in which the black candidate got 45% of the white vote, and 96% of the black vote. In the ensuing primary runoff the black candidate got only 26% of the white vote, and 92% of the black vote. *Id.* at 14; J. App. 66-71.

The 1992 primary and runoff in the Eleventh District were also racially polarized. In the primary, which involved one white and four black candidates, the white candidate, DeLoach, was the first choice among whites with 45% of the white vote. Cynthia McKinney, who was the leading vote getter over all, was second among whites with 20% of the white vote. *Johnson I*, DOJ Ex. 24 at 17; *Abrams v. Johnson*, No. 94-797, J.App. 22. In the run-off, whites increased their support of DeLoach to 77%. McKinney's white vote support increased to just 23%. *Id.*

Dr. Lichtman found voting patterns to be different in statewide non-partisan judicial elections in which appointed blacks ran as incumbents. He included these contests in his report but treated them as having "minimal relevance." *Johnson I*, T.Vol.V,228.

With the exception of judicial elections in which blacks were first appointed and ran as incumbents, no black has ever been elected to a statewide office in Georgia. *Johnson I*, T.Vol.VI,77. No black, other than Andrew Young, has ever been elected to Congress from Georgia from a majority white district. *Johnson I*, Stip. 241.

Dr. Lichtman also testified that blacks have a lower socio-economic status than whites which was a barrier to

blacks' participation in the political process. *Johnson I*, T.Vol.V,206. In the 1988 and 1992 presidential elections, black turnout was 14-15% lower than white turnout. *Id.* at 208. In the 1992 elections in the Eleventh District, blacks were 51.5% of all voters in the primary, but only 46-47% of voters in the runoff. *Id.* at 212-13; J. App. 77-8.

The state's expert, Dr. Joseph Katz, performed an independent homogeneous precinct analysis to estimate "average racial voting patterns." *Johnson I*, Defendants Exhibit 170; T.Vol.V,48,81. He agreed that "[w]hites tend to vote for white candidates and blacks tend to vote for black candidates." *Johnson I*, T.Vol.V,84. He concluded that whites vote for white candidates in the range of 71-73%. *Id.* He did not believe a black candidate had an even (50%) chance to win until a district contained at least 50% of black registered voters. *Id.* at 84-5. Dr. Katz also found judicial elections to be "materially different" and that it would be "inappropriate" to use them in determining voting patterns in congressional elections. *Id.* at 74, 83.

The plaintiffs' expert, Dr. Ronald Weber, agreed there was "some evidence" of racial polarization in voting. *Johnson I*, T.Vol.IV,259. Taking into account judicial elections involving appointed black incumbents, he did not think the racial bloc voting was "very strong." *Id.* at 324.

Of the 40 black members of the Georgia general assembly, only one was elected from a majority white district. *Johnson I*, T.Vol.IV,236; J.A. 26-7. Of the 31 black members of the house, 26 were elected from districts that were 60% or more black. Of the nine black members of the senate, eight were elected from districts that were

60% or more black. *Johnson I*, Abrams Exhibits 23-4; T.Vol.VI,208; DOJ Ex. 57; T.Vol.VI,204. While only one black was elected from a majority white district, whites won in 16 (29%) of the 55 majority black house and senate districts. *Abrams v. Johnson*, No. 94-797, J.App. 26-7.

F. The Decision of the District Court. The court issued its plan on December 13, 1995 (Judge Edmondson dissenting). The district court, in its own words, proceeded as if the state had adopted "no plans." J.S.App. 7. According to the court,

> Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent.

J.S.App. 4. *Also see* J.S.App. 5 ("we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals"), J.S.App. 6 ("we are unable to use Georgia's current plan as the basis for a remedy"), J.S.App. 7 ("the Court's task is akin to those cases in which states had no plans").

The district court was of the view that no deference was due the existing plan because it was the product of "Department of Justice [i]nterference." J.S.App. 4. The court said that "DOJ basically used the preclearance process to force Georgia to adopt the ACLU redistricting plan and, in the process, subvert its own legislative preferences to those of the DOJ." J.S.App. 5. Accordingly, the court was "not bound by *Upham* to make only minimal changes to the current plan in fashioning a remedy."

J.S.App. 5-6. Adopting a remedy that would be "minimally disruptive to Georgia's current plan was not an option." J.S.App. 29. Any remedy "would necessarily have resulted in drastic changes." J.S.App. 6.

The court's plan eliminated two of the three majority black districts in the existing plan, reducing the black VAP in the Second District from 52.3% to 35.1%, and in the Eleventh from 60.4% to 10.8%. *Johnson I*, 864 F.Supp. at 1366 n.12. The black VAP in the remaining majority black district, the Fifth, was increased from 53% to 57.2%. J.S.App. 16.

The court refused to draw a second majority black district because in its view "Georgia's minority population is not geographically compact." J.S.App. 22. The court conceded, however, that:

> If Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so.

J.S.App. 22 n.16.

In concluding that blacks were not geographically compact, the court failed to discuss the remedial plans proposed by appellants and the *amici*. The court dismissed the Illustrative Plan proposed by the United States because it allegedly split "numerous counties outside the metropolitan Atlanta area." J.S.App. 8, n.4. As noted *supra*, the Illustrative Plan in fact split only two counties outside the metropolitan Atlanta area.

The court's findings regarding the existence of racial bloc voting were contradictory. On the one hand, the court held that "while some degree of vote polarization exists, it is 'not in alarming quantities.' *Johnson I*, 864 F.Supp. at 1390." J.S.App. 23. For that reason, "the remedy we now impose meets the requirements of Section 2 without containing two majority-minority districts." J.S.App. 24.

On the other hand, the court held that "Section 2 of the VRA required the Court to maintain the Fifth District as a majority-minority district." J.S.App. 18. Because of racial bloc voting "based on statewide figures," J.S.App. 26 n.18, a district containing "the percentage of black registered voters as close to fifty-five percent as possible was necessary . . . to avoid dilution of the Fifth District minorities' rights." J.S.App. 26. The plan adopted by the court thus preserved the Fifth District as a majority-minority district. At the same time, the black population in the Second and Eleventh Districts was dispersed throughout the state into other districts. The black VAP was increased in the First District from 20.3% to 27.7%, in the Third from 16.3% to 22.5%, in the Fourth from 10.8% to 32%, in the Eighth from 18.4% to 28.3%, and in the Tenth from 16.5% to 34.5%. *Abrams v. Johnson*, No. 94-797, J.App. 20; J.S.App. 39.

The court's plan relocated the Eleventh District, which under all its prior configurations ran from South DeKalb County to the southeast, and put it "in the Northeast Atlanta corridor" where it would have an "urban/suburban flavor," J.S.App. 13-4, and be "a 'radius' district reaching from suburban Atlanta to the state line." J.S.App. 14. The justification for the relocation was that

this was an area containing a "community of interests" and "where future growth is anticipated." J.S.App. 13-4. The Eleventh District was also structured around "Interstate Eighty-Five as a very real connecting cable." J.S.App. 14.

The court substantially reconfigured the Third, Eighth, and Tenth Districts as well. Under the prior plan the Third District was located essentially in the center of the state. *Abrams v. Johnson*, No. 94-797, J.App. 51. The court's plan moved it to the western edge of the state. J.S.App. 41. The new Tenth District was relocated south to fill the void left by moving the Eleventh to the northeast Atlanta corridor. *Id.* Under the court's plan the Eighth District runs from the Florida line north to metropolitan Bibb County and thence further north to the suburbs of Atlanta, including in a single district the metropolitan hub counties of Lamar, Upson, and Monroe with the rural, south Georgia counties of Echols, Clinch, and Charlton. *Id.*

The court's plan moved a total of 2,020,820 people – 31.2% of the state's population – into new congressional districts. Abrams Intervenors' Motion for Hearing and for Reconsideration, Declaration of Linda Meggers. By contrast, appellants' proposed least-change plan (ACLU1A) moved only 784,531 people into new districts, or 12.1% of the population of the state. Abrams Intervenors' Memorandum in Response to Submission of Additional Demographic Evidence by Defendants Miller, Howard & Cleland, November 27, 1995 letter from Linda Meggers.

In devising its plan the court, by its own admission, "subordinated" protection of incumbents "to other considerations." J.S.App. 18. It moved the incumbent in the Eleventh District to the Fourth District, the incumbent in the Second District to the Third District, and the incumbent in the Eighth District to the Second District. The effect of these changes was to create potential contests between incumbents in Districts Three and Four. J.S.App. 18-9. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

The court's plan contained a total deviation among districts of 0.35%. J.S.App. 39. As noted *supra*, alternative plans proposed by the parties contained lower deviations, *i.e.*, the Illustrative Plan proposed by the United States with a deviation of only 0.19%, and appellants' ACLU1A plan with a deviation of 0.29%.

The district court justified the deviation in its plan by deferring to the state's preference "for not splitting counties outside of the metropolitan area," J.S.App. 8, and because it wished to maintain "communities of interest." J.S.App. 11. In addition, the court noted that "no precise count of a district's population can be made using 1900 data." J.S.App. 12.

Judge Edmondson did not file a written dissenting opinion. During the August 22, 1995 hearing, however, he indicated in comments from the bench that the duty of a federal court was "in each instance to make the least amount of changes, the fewest amounts of changes, and the least dramatic changes, possible" to bring a plan into compliance with the Constitution. T., Aug. 22, 1995, p. 29.

In his view, the court did not have a license to "just redraw Georgia." *Id.* at 36.

On January 8, 1996 the court denied appellants' motion for reconsideration and an evidentiary hearing to challenge the court ordered plan. Appellants filed their notice of appeal on January 11, 1996. J.S.App. 46. The district court denied appellants' application for a stay pending appeal on January 26, 1996. This Court denied appellants' application for a stay on February 6, 1996. *Abrams v. Johnson*, 116 S.Ct. 899 (1996). After noting probable jurisdiction, the Court denied appellants' renewed application for a stay on June 7, 1996. *Abrams v. Johnson*, A-982.

SUMMARY OF ARGUMENT

The district court abused its equitable powers in completely redrawing the congressional map of Georgia. The powers of the federal courts must be adequate to the task of fashioning remedies for violations, but those powers are limited. Any remedy must be related to the conditions that are found to offend the Constitution.

In the area of redistricting, deference by federal courts to state policy choices is especially compelling. That is true because the states have primary responsibility for apportionment. When a district court must act in the legislature's stead, it must accomplish its task circumspectly, and in a manner that is free from any taint of arbitrariness or discrimination.

The district court ignored the state's traditional interest in preserving the core of existing districts. It completely relocated the Eleventh District and placed it in the northeast Atlanta corridor because it felt that was a better location for the district. The court also drastically reconfigured other districts, including the Third, the Eighth, and the Tenth.

The court's plan moved incumbents and pitted them against each other in a number of districts in disregard for the state's traditional policy of avoiding contests between incumbents. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

The court's plan shifted nearly a third of the state's population into new districts. Least-change plans proposed by the parties and *amici* showed that it was possible to draw far less disruptive plans that at the same time cured the constitutional defects in the prior plan.

The court eliminated two of the three majority black districts in the existing plan, despite its acknowledgment of the legislature's decision to create a second majority black district after the 1990 census. The court's justification for refusing to draw a second majority black district was that Georgia's minority population was not geographically compact. The legislature, however, in enacting its first plan was of the view that the black population *was* sufficiently compact to constitute a majority in a second congressional district.

Proposed remedial plans were also submitted by the parties and *amici* which showed that a compact second majority black district can be drawn in Georgia while

adhering to the state's traditional districting principles. As long as a state does not subordinate traditional redistricting principles to race, it may intentionally create majority-minority districts, and may otherwise take race into consideration, without being subjected to strict scrutiny.

The court's plan violates Section 2 of the Voting Rights Act. Blacks in Georgia are geographically compact. As appears from various plans submitted to the district court, it is clearly possible to draw two reasonably compact majority black congressional districts in the state. Blacks are also politically cohesive, while their preferred candidates are usually defeated by whites voting as a bloc. As the lower court found, a district containing approximately 55% of black registered voters was necessary to avoid dilution of minority voting strength.

The district court's plan is retrogressive in violation of Section 5. The court's plan reduced the number of majority black districts from the levels in the third legislative plan (which had three of eleven) and the first legislative plan (which had two of eleven), to only one of eleven in a state that is 27% black. Minorities admittedly have fewer electoral opportunities under the court ordered plan than under any of these pre-existing plans.

The court used the 1982 plan as a benchmark for measuring retrogression. The 1982 plan was not only malapportioned but contained ten districts while the 1992 plan contains eleven. The ten seat 1982 plan by definition cannot serve as a reasonable benchmark by which to evaluate the court's eleven seat plan. The most appropriate benchmarks for determining retrogression are either

the state's initial eleven seat plan containing two majority black districts, or the state's policy and goal of creating two majority black districts. Using either of these benchmarks, the court ordered plan would violate the retrogression standard of Section 5.

The court's plan does not comply with one person, one vote. Congressional redistricting is held to even stricter standards than legislative redistricting. The total deviation among districts in the district court's plan is 0.35%. Plans with lower overall deviations were submitted to the court by the United States (0.19%) and by appellants (0.29%). Other district courts have had no difficulty in drafting or approving plans with zero deviations.

ARGUMENT

I. The District Court Abused Its Equitable Powers

The powers of the federal courts must be adequate to the task of fashioning remedies for constitutional violations, but those powers "are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Any remedy must be related to "the condition alleged to offend the Constitution." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974). *See Missouri v. Jenkins*, 115 S.Ct. 2038, 2058 (1995) (federal courts do not have "a blank check to impose unlimited remedies upon a constitutional violator") (O'Connor, J., concurring).

In the area of redistricting, deference by federal courts to state policy choices is especially compelling. That is true because "the Constitution leaves with the

States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993). *See* Art. I, § 4, cl. 1, Constitution of the United States ("[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"). *See also Chapman v. Meier*, 420 U.S. 1, 27 (1975).

While an elected legislature is situated to identify and reconcile traditional state policies, "[t]he federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 415 (1977). When a district court must act in the legislature's stead, its "task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.' " *Connor v. Finch*, 431 U.S. at 415, *quoting Roman v. Sincock*, 377 U.S. 695, 710 (1964).

> A court
>
> should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.

White v. Weiser, 412 U.S. 783, 795 (1973). Because states derive their reapportionment authority from independent provisions of state and federal law, "federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich*

v. Quilter, 113 S.Ct. 1149, 1157 (1993). The decisions and judgments of a state legislature "in pursuit of what are deemed important state interests . . . should not be unnecessarily put aside in the course of fashioning relief." *White v. Weiser*, 412 U.S. at 796.[5]

These principles are exemplified by *Upham v. Seamon*, 456 U.S. 37 (1982). There, the Attorney General objected under Section 5 to two congressional districts in Texas. The district court proceeded to resolve the objections to the districts but in addition devised its own plan for four

---

[5] One of the reasons federal courts should act circumspectly and adhere to state legislative policy choices where possible is to avoid even the appearance of partisan or other bias. The "drastic changes" approach of the district court in this case has, unfortunately, given rise to speculation that the plan was driven by partisan bias favoring Democrats at the expense of Republicans. J.S.App. 6. *See* Jeff Dickerson, "At Christmas, black party loyalty doesn't pay off," The Atlanta Journal, December 20, 1995 ("The judges – both appointed by Democrats, coincidentally – did away with two of the state's three majority black districts, balkanizing the black vote in a way that benefits white Democrats"); Kevin Merida, "ACLU to Appeal Decision Remapping Ga. Districts," Washington Post, December 15, 1995 (quoting the chair of the Georgia Democratic Party that "[t]he changes that were made favored us in virtually every district"); Mike Christensen, "Reactions to the plan are all over the map," Atlanta Journal Constitution, December 14, 1995 (quoting Rep. John Linder that " '[i]t appears that the two Democratic judges tried to draw a map for white Democrats . . . [w]hat [Georgia House Speaker] Tom Murphy couldn't get done on the floor of the Legislature he got the judges to do for him' "). Public trust and confidence in the impartiality of the judiciary cannot but be undermined by the unnecessary breadth of the redistricting by the district court in this case.

other districts as to which there had been no objection. 456 U.S. at 40. In vacating the decision, the Court noted that "[t]he only limits on judicial deference to state apportionment policy . . . were the substantive constitutional and statutory standards to which such plans are subject." 456 U.S. at 42. In fashioning a court ordered remedy, therefore, a district court may not reject state policy more than is necessary "to meet the specific constitutional violations involved." *Id.* In remanding the case for further proceedings, the Court concluded that:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of 'reconciling the requirements of the Constitution with the goals of state policy.' *Connor v. Finch, supra,* at 414, 97 S.Ct. at 1833. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

456 U.S. at 43.

In light of *Upham*, the district court's remedial powers in this case were limited to curing any constitutional defects in the Second and Eleventh Districts. Far from following *Upham*, the district court redrew the entire congressional map for the state of Georgia, proceeding by

its own admission as if the state had adopted "no plans." J.S.App. 7.

A. Ignoring District Cores. The district court ignored the state's traditional, longstanding, and explicitly articulated interest of "preserving the core of existing districts." *Miller v. Johnson*, 115 S.Ct. at 2483. It completely relocated the Eleventh District and placed it "in the Northeast Atlanta corridor out to the northeast Georgia state line," where it would have an "urban/suburban flavor." J.S.App. 13-4. The court justified this new location of the district on the grounds that it was in an area of anticipated future growth, and "[t]he road net, the area's commerce, its recreational aspect, and other features produce a district with a palpable community of interests." J.S.App. 14. Even assuming all of that to be true, it provides no basis for the court substituting its own judgment for that of the legislature about where the district should be located in the state, particularly where a district can be drawn southeast from South DeKalb County that cures the constitutional defects identified by the Court and which is based upon the state's traditional redistricting principles.

Elaborating on its "road net" rationale for relocating the Eleventh District, the district court explained that the new district follows a progression of counties that "have Interstate Eighty-Five as a very real connecting cable." J.S.App. 14. Ironically, it was the configuration of the Twelfth Congressional District in North Carolina along the very same interstate that drew the sharpest criticism of that district. *See Shaw v. Reno*, 113 S.Ct. 2816, 2821, 2825, 2832 (1993) (describing the Twelfth District as being "unusually shaped," "bizarre on its face," and "irrational

on its face" because for much of its length it closely followed "the I-85 corridor"). Constructing a district along a major highway can, therefore, depending on the redistricting outcome one favors, be evidence of bizarreness and irrationality, or "a very real connecting cable." J.S.App. 14.

As the court's "road net" analysis demonstrates, a resourceful map maker can justify *any* plan, particularly one drawn at the congressional level, based upon "communities of interests," including those similar to or different from the ones identified by the district court. It would be quite impossible to draw a district in Georgia containing some 589,000 people without including a substantial number – or an infinity – of communities of interests, *e.g.*, business people, working class families, poor people, members of the middle class, church goers, sports fans, high school graduates, high school dropouts, people and neighborhoods concerned about crime prevention and improving public education, or individuals and groups concerned about the national debt, the space program, international terrorism, and ethnic cleansing and genocide, etc. Certainly these "communities of interest" have as much claim to congressional representation as an area's "road net," or its "commerce," or its "recreational aspect," communities of interest relied upon by the district court to justify its relocation of the Eleventh District. J.S.App. 22.

In reality, "community of interests" is an amorphous and illusive concept. One can define it in any way one chooses, which is one reason why the federal courts should leave the definition to state legislatures. Certainly a federal court, whose equitable powers properly extend

only to curing identifiable constitutional and statutory defects, has no warrant gratuitously to substitute its own definition of what a community of interests is for that of the legislature. *White v. Weiser*, 412 U.S. at 795 ("[i]n fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary' "), *quoting Whitcomb v. Chavis*, 403 U.S. at 160. The district court's choice of communities of interest was exactly the arbitrariness that *Roman v. Sincock*, 377 U.S. at 710, forbade.

The district court also drastically reconfigured the Third and Tenth Districts. It moved the Third District from the center of the state to its western edge. It relocated the Tenth District, moving it south to fill the void created by moving the Eleventh District to the Northeast Atlanta corridor.

The court created an Eighth District that runs from the Florida line to the metropolitan hub counties of Lamar, Upson, and Monroe, and included in one sprawling district the smallest county in the state, Echols (population 2,334), with one of the largest metropolitan counties in the state, Bibb (population 149,967). To use the words of this Court in invalidating the Eleventh, the Eighth District includes areas that are "miles apart in distance and worlds apart in culture." *Miller v. Johnson*, 115 S.Ct. at 2484. The Eighth is the kind of "geographic monstrosity" criticized by the majority in *Miller*. *Id.*

The willingness of the district court to draw the kind of districts in its own plan that both it and this Court condemned in the plan drawn by the state indicates that

the district court applied a dual standard in redistricting. Moreover, it is a dual standard that is impermissibly based upon race, for it measures majority black districts by one set of size and compactness criteria and majority white districts by another. The use of such a dual standard inevitable calls into question the "arbitrariness" of the district court's plan, *Roman v. Sincock*, 377 U.S. at 710, and contravenes the assurance given by this Court that majority-minority districts are not to be treated "*less* favorably" than those that are majority white. *Miller v. Johnson*, 115 S.Ct. at 2497 (O'Connor, J., concurring).

B. Maximum Disruption. The court's plan moved incumbents and pitted them against each other in a number of districts, again in disregard for the state's traditional and stated policy of "avoiding contests between incumbents." *Miller v. Johnson*, 115 S.Ct. at 2483. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

The court's plan shifted nearly a third of the state's population into new districts. Least-change plans proposed by the parties and *amici* showed that it was possible to draw far less disruptive plans that at the same time cured the constitutional defects in the prior plan. Abrams Intervenors' Memorandum in Response to Submission of Additional Demographic Evidence by Defendants Miller, Howard & Cleland, November 27, 1995 letter from Linda Meggers. Under appellants' ACLU1A plan, only 12.1% of the state's population was placed in a different district.

C. Destroying Majority Black Districts. The court also eliminated two of the three majority black districts in

the existing plan, despite its acknowledgment of the legislature's decision to create a second majority black district after the 1990 census. J.S.App. 22 n.16. The first plan enacted by the legislature *prior* to any involvement by the Department of Justice contained a second majority black district (the Eleventh) running Southeast from DeKalb County. *Miller v. Johnson*, 115 S.Ct. at 2483. That plan necessarily reflected the legislature's, not DOJ's, reapportionment policies and goals.

In their brief in this Court in *Miller v. Johnson*, the state repeatedly stressed "the undisputed consensus of all the legislators involved – both white and black, Republican and Democrat – that the first plan was reasonable." *Miller v. Johnson*, No. 94-631, Brief of Appellant Miller et al., p. 18. There is no evidence that the first plan was based predominantly upon race or that the state subordinated its traditional redistricting principles to race in the construction of the plan. Again, in its brief, the state said that:

> It is undisputed that the General Assembly as a whole found the initial [1991 congressional redistricting] plan enacted to be reasonable. It was not perceived as a 'racial gerrymander.' . . . *There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.*

Miller v. Johnson, No. 94-631, Brief of Appellants Miller *et al.*, p. 49 (emphasis in original).

In addition, the plaintiffs in *Miller v. Johnson*, never contended in the district court that the first or second congressional redistricting plans were unconstitutional, and introduced no evidence that they were. In response to a question from the district court, the plaintiffs' lawyer responded that "I don't think that we have a position on the

first two plans because they never went to law." *Johnson I*, T.Vol.II,23. Nor was there any finding by the district court that the first plan enacted by the legislature was unconstitutional.

The record itself refutes any contention that the Eleventh District was initially drawn "solely" on the basis of race. The first plan excluded "a sizable black population in Baldwin County," *Johnson I*, T.Vol.II,21 (Testimony of Linda Meggers), as well as "a sizable black population of Chatham [County]". *Id.* at 25. Had the construction of the Eleventh District been driven solely by race it would have included these areas.

The speaker of the house said that the Eleventh District as drawn in the first plan "suited me," was "obviously" acceptable, and denied that it was "a racial gerrymander." *Johnson I*, T.Vol.II,81. The chair of the house reapportionment committee similarly testified that in enacting the first congressional plan, "[we] thought we had done pretty well." *Johnson I*, T.Vol.III,252 (Testimony of Bob Hanner). The state complied with the Voting Rights Act, as well as followed its traditional redistricting principles, *i.e.*, "we kept cities and counties intact." *Id.*

The court's justification for refusing to draw a second majority black district was that "Georgia's minority population is not geographically compact." J.S.App. 22. The legislature, however, in enacting its first plan was obviously of the view that the black population *was* sufficiently compact to constitute a majority in a second congressional district.

The state's demographer also testified that the Eleventh District in the first plan contained fewer counties than many other Georgia congressional districts, and in terms of its size and length was "within the range of districts that the state

has created in the past." T., Oct. 30, 1995, p. 444. Proposed remedial plans submitted by the parties and *amici*, *e.g.*, the Illustrative Plan, ACLU1A, and Amicus R, also showed that a compact second majority black district can be drawn in Georgia while adhering to the state's traditional districting principles.

While this Court held in *Miller* that the legislature's *third* post-1990 plan – adopted after the Attorney General refused to preclear the first two plans – is unconstitutional, the Court never held or suggested that the first plan is unconstitutional. The first plan enacted by the state was based upon the state's traditional districting principles and would not trigger strict scrutiny under *Miller v. Johnson*, 115 S.Ct. at 2497 ("[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices") (O'Connor, J., concurring). It was error for the district court to ignore the judgment of the legislature, especially when, as noted *infra*, doing so diluted the voting strength of a "community defined by actual shared interests." *Miller v. Johnson*, 115 S.Ct. at 2475.

D. Unnecessary Speculation. The district court attempted to distinguish *Upham* by claiming that the existing plan "does not represent the goals of Georgia's historic policies nor the state legislature's true intent." J.S.App. 4. However, the "policies" and "true intent" of the state *were* represented in the first plan enacted by the legislature *prior* to any involvement by the Department of Justice.

The district court's defense of its "drastic changes" approach based upon speculation about what "the legislature might have done had it not been for the DOJ's

subversion of the redistricting process," J.S.App. 13, is therefore misplaced. One does not have to resort to speculation; in enacting the first plan, we know what the legislature *actually did*. Unless the state's legislative policy and goal of a second majority black district was unconstitutional, the district court was not free to ignore it. This Court has never held or suggested that the creation of a majority black district is *per se* suspect. *See Bush v. Vera*, 64 U.S.L.W. 4452, 4455 (1996) ("as we have emphasized . . . the decision to create a majority-minority district [is not] objectionable in and of itself"). As long as a state does not subordinate traditional redistricting principles to race, it "may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny." *Id.* at 4464 (O'Connor, J., concurring). *See DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994) (strict scrutiny did not apply to a deliberately created compact majority-minority district), *aff'd*, 115 S.Ct. 2637 (1995). Nor did the Court hold or suggest that Georgia's first plan was unconstitutional or in violation of the Voting Rights Act or subject to strict scrutiny. Insofar as the Voting Rights Act is concerned, the Court acknowledged that the first plan was " 'ameliorative' and could not have violated § 5's non-retrogression principle." *Miller v. Johnson*, 115 S.Ct. at 2492.

In summary, in implementing its plan the district court: (1) proceeded as if the state had previously enacted "no plans;" (2) ignored the state's traditional interest in preserving the cores of existing districts; (3) substituted its own judgment of what constituted a "community of interests" for that of the state; (4) applied a dual standard based upon race that measured majority black districts by

one set of size and compactness criteria and majority white districts by another; (5) subordinated the state's interest in protecting incumbents; (6) disproportionately disadvantaged black incumbents; (7) caused maximum disruption by shifting nearly a third of the state's population into new districts; and, (8) destroyed two of the three majority black districts, despite the legislature's clearly stated objective of creating two majority black districts.

By contrast, plans submitted by appellants, the United States, and *amici* showed that plans could have been adopted which cured the constitutional defects in the existing plan, but at the same time caused minimum disruption, respected the state's traditional interest in preserving the cores of existing districts, respected the state's judgment of what constituted a "community of interest," applied the same size and compactness criteria to majority black as to majority white districts, respected the state's interest in protecting incumbents, did not disproportionately disadvantage black incumbents, and respected the legislature's objective of creating two majority black districts.

The district court's plan is not the kind of minimally disruptive plan based upon the state's traditional redistricting principles that the court was obligated to adopt. *Upham v. Seamon*, 456 U.S. at 43. Nor was the district court at liberty to brush the state's policies aside and substitute its own judgment that "Georgians deserve a better fate" than to have two majority black congressional districts. J.S.App. 22. *See Whitcomb v. Chavis*, 403 U.S. at 161.

II. The Court's Plan Violates Section 2

Despite its conclusion to the contrary, the court ordered plan dilutes minority voting strength in violation of Section 2. In determining whether a challenged voting practice violates Section 2, a court must decide if the practice "results in a denial or abridgement of the right . . . to vote on account of race or color," *i.e.*, whether minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The legislative history of Section 2, particularly the Senate Report, indicates that "a variety of factors, depending upon the kind of rule, practice, or procedure called into question," are relevant in determining if a plan "results" in discrimination. S. Rep. No. 417, 97th Cong. 2d Sess. 28-9 (1982). Typical factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. See Thornburg v. Gingles, 478 U.S. 30, 36-7 (1986) (listing the Senate factors).

There is no requirement that any particular number of the Senate factors be proved, or that a majority of them point one way or the other. Instead, Section 2

> requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* and *Burns*, 'minimized or canceled out.'

S. Rep. No. 417 at 29 n.118. *Accord, Johnson v. De Grandy*, 114 S.Ct. 2647, 2657 (1994) (in resolving claims of vote dilution, courts must examine "evidence in the totality of circumstances").

The analysis of the Senate Report was approved and applied by the Court in *Thornburg v. Gingles*, 478 U.S. at 43-5. In *Gingles*, a challenge to multimember legislative

districts in North Carolina, the Court analyzed the statutory language and legislative history of Section 2 and simplified the application of the Senate factors. It held that:

> the essence of a § 2 claim is that a certain electoral law, practice, or structure, interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.

478 U.S. at 476.

According to the Court, the most important considerations in determining a Section 2 violation are: (1) whether the minority group is sufficiently large and geographically compact to constitute a majority in one or more single member districts; (2) whether the minority is politically cohesive, *i.e.*, tends to vote as a bloc; and, (3) whether the majority also votes as a bloc "usually to defeat the minority's preferred candidate." 478 U.S. at 50-1. The other factors listed in the Senate report "are supportive of, but *not essential to*, a minority voter's claim." 478 U.S. at 48 n.15 (emphasis in original).

The *Gingles* formulation has been regularly applied by the lower federal courts, and its constitutionality has been assumed or affirmed by a majority of this Court. *See Voinovich v. Quilter*, 113 S.Ct. at 1155; *Bush v. Vera*, 64 U.S.L.W. at 4464 ("[w]e should allow States to assume the constitutionality of § 2 of the Voting Rights Act, including the 1982 amendments") (O'Connor, J., concurring); 4481 ("compliance with § 2 of the Voting Rights Act is a compelling state interest") (Souter, J., dissenting); 4476

("a state has a compelling interest in complying with § 2 of the Voting Rights Act") (Stevens, J., dissenting).

This Court has also made it clear that Section 2 standards apply to court ordered redistricting plans. In *SRAC v. Theodore*, 113 S.Ct. 2954 (1993), involving legislative and congressional redistricting in South Carolina, the Court vacated and remanded "for further consideration in light of the position presented by the Solicitor General in his Brief for the United States." The Solicitor General's position was that "the court was required to afford all parties the opportunity to present specific Section 2 objections before imposing those plans for use in future elections." *SRAC v. Theodore*, No. 92-155 (S.Ct.), Brief for the United States as Amicus Curiae, p. 18. *See also Winter v. Brooks*, 461 U.S. 921 (1983), *vacating and remanding Jordan v. Winter*, 541 F.Supp. 1135 (N.D.Miss. 1982) (remanding a court ordered redistricting plan "for further consideration in light of Section 2 of the Voting Rights Act"); *Edge v. Sumter County School District*, 775 F.2d 1509, 1510 (11th Cir. 1985) ("the district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the Voting Rights Act").

The evidence shows that blacks in Georgia are geographically compact. As appears from various plans submitted to the district court, *e.g.*, the Illustrative Plan, ACLU1A, and Amicus R, as well as the first plan enacted by the legislature, it is clearly possible to draw two reasonably compact majority black congressional districts in the state.

Proof of the second and third *Gingles* factors, *i.e.*, that the minority is politically cohesive and that its preferred

candidates are usually defeated by whites voting as a bloc, depends primarily upon proof of racial bloc voting. 478 U.S. at 56. Consistent with the evidence that voting in Georgia is polarized and that blacks are politically cohesive, the district court found "a significant drop in the probability of a black candidate being elected as the black percentage of registered voters declines to fifty percent." J.S.App. 26. For that reason, the court held that a district containing approximately 55% of black registered voters was necessary to avoid dilution of minority voting strength. *Id.* at 26.

The evidence also shows, as the district court indicated, *see* J.S.App. 26, that the racial bloc voting is legally significant in that the majority votes as a bloc in the majority white jurisdictions "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-1. In addition, the totality of the circumstances, including evidence of past discrimination and its continuing effects, strongly supports a finding that the court's plan would result in discrimination in violation of Section 2. *Johnson v. De Grandy*, 114 S.Ct. at 2660. While it refused to grant appellants a hearing on the issue, the court's plan, which creates only one majority black district, violates Section 2 of the Voting Rights Act. The court's finding that its plan does not violate Section 2 is clearly erroneous.

A. No Deference Is Due the Court's Ruling. Any deference ordinarily due the district court's Section 2 finding under the clearly erroneous rule is undermined, not only because the court refused to hold a Section 2 hearing on the adequacy of its plan, *see, e.g., SRAC v. Theodore*, but because it barred private intervention to defend the constitutionality of the Second District. By

doing so, it pretermitted the development of a full Section 2 record.

The basis for denying private intervention was that the interests of any intervenors was adequately represented by the state. J.S.App. 42-3. Defendant Murphy, however, stipulated that the Second District was unconstitutional. The remaining state defendants did not argue that a majority black Second District was needed to eliminate the effects of past discrimination in voting, nor to comply with Section 2 of the Voting Rights Act. By their own admission, they presented no witnesses and took no part in the examination of witnesses. Finally, none of the state defendants appealed the decision of the district court invalidating the Second District. It is clear that appellants' interests were not adequately represented at trial, and that as a result a full Section 2 record was not developed.

Deference under the clearly erroneous rule is accorded on the assumption that the trial court has had an opportunity "to evaluate the credibility of witnesses and to weigh the evidence." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982). But where, as here, the state presented no witnesses and the trial court based its findings upon an inadequately developed record, a reviewing court should not be bound by the clearly erroneous standard. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (rationale for the clearly erroneous rule is that the trial court is in a position "to appraise and weigh the evidence"). No deference is due the finding of the district court that its plan complied with Section 2.

III. The Plan Is Retrogressive in Violation of Section 5

While federal court ordered plans are not themselves subject to Section 5 preclearance, they nevertheless must comply with Section 5 standards. *McDaniel v. Sanchez*, 452 U.S. 130, 138, 148-49 (1981); S.Rep. No. 295, 94th Cong. 18-9 (1975) (in fashioning a remedial plan a "court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedent developed in Section 5 cases"). Court ordered plans must, therefore, avoid retrogression under the "effect" standard of Section 5. J.S.App. 50-2.

In *Beer v. United States*, 425 U.S. 130, 141 (1976), the Court defined retrogression prohibited by Section 5 as a change in voting that diminishes the voting strength of a covered minority. *See City of Lockhart v. United States*, 460 U.S. 125, 135 (1983) (retrogression is determined by whether or not minorities have the "same" electoral opportunities before and after a voting change).

The court ordered plan in this case reduced the number of majority black districts from the levels in the third legislative plan (which had three of eleven) and the first legislative plan (which had two of eleven), to only one of eleven in a state that is 27% black. Minorities admittedly have fewer electoral opportunities under the court ordered plan than under any of these pre-existing plans.

The court in *Johnson I*, 864 F.Supp. at 1369, acknowledged that by invalidating the Eleventh District it was "depriving black citizens" of electoral opportunities. The court ordered plan which destroyed a second majority

black district imposed an even greater deprivation. The court ordered plan is plainly retrogressive.

The court took the position that its plan was not retrogressive "when compared to the 1982 plan." J.S.App. 27. This comparison, however, overlooks the fact that the 1982 plan contained ten districts while the 1992 plan contains eleven. To use the well-worn phrase, comparing the two plans is like comparing apples and oranges. The ten seat 1982 plan by definition cannot serve as "a reasonable benchmark by which to evaluate" the court's eleven seat plan. *Holder v. Hall*, 114 S.Ct. 2581, 2586 (1994).

Even assuming the 1982 plan were a proper benchmark, the court ordered plan would still be retrogressive. Under the 1980 plan one (10%) of the ten districts was majority black. Under the court's plan only one (9%) of the eleven districts is majority black. Blacks would not have the "same" electoral opportunities under a plan in which they were a majority in one of eleven districts than a plan in which they were a majority in one of ten districts. *City of Lockhart v. United States*, 460 U.S. at 135.

The district court's benchmark, the 1982 plan, is also malapportioned and therefore unconstitutional. *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). There is no state or federal policy that is advanced by using an admittedly unconstitutional plan as a benchmark, particularly where, because of the intervening increase in size of the state's congressional delegation, other more appropriate benchmarks exist. The most appropriate benchmarks for determining retrogression are either the state's initial eleven seat plan containing two majority black districts,

or the state's policy and goal of creating two majority black districts. Using either of these benchmarks, the court ordered plan would violate the retrogression standard of *Beer*.

The plan first adopted by the state in 1991 was not legally enforceable as a matter of federal law because it was objected to under Section 5. *Clark v. Roemer*, 500 U.S. 646, 654 (1991) (absent "extreme circumstance" an objected to voting practice is unenforceable). However, the plan did embody the state's redistricting policy of creating two majority black districts which was *not* objected to by the Attorney General. That policy can provide a benchmark for determining retrogression. *Upham v. Seamon*, 456 U.S. at 42 (a court must defer where possible to "state policy choices").

Moreover, this Court held in *Miller v. Johnson*, 115 S.Ct. at 2492, that the first plan enacted by the state "could not have violated § 5's non-retrogression principle." Given the Court's imprimatur, it is entirely appropriate to use the 1991 plan containing two majority black districts as the benchmark for determining retrogression. Using an appropriate benchmark, the court ordered plan violates Section 5.

IV. The Plan Does not Comply with One Person, One Vote

Because congressional redistricting is governed by Article I, Section 2 of the Constitution, "absolute population equality [is] the paramount objective." *Karcher v. Daggett*, 462 U.S. at 732. Federal courts, moreover, are held to even stricter standards in redistricting than legislatures. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

The total deviation among districts in the district court's plan is 0.35%. J.S.App. 39. Plans with lower overall deviations were submitted to the court by the United States, *i.e.*, the Illustrative Plan with a deviation of 0.19%, *United States v. Johnson*, No. 95-1460, J.S.App. 45a, and by appellants, *i.e.*, Plan A with a deviation of 0.29%. J.App. 199. Given modern computer technology, there is no reason why there should be any deviation in a court ordered congressional redistricting plan. Other district courts have had no difficulty in drafting or approving plans with zero deviations. *See Hastert v. State Board of Elections*, 777 F.Supp. 634, 644 (N.D.Ill. 1991) (adopting a plan containing "mathematically perfect population equality"), and *Burton v. Sheheen*, 793 F.Supp. 1329, 1367-68 (D.S.C. 1992) (court ordered plan containing zero deviation), *vacated and remanded on other grounds sub nom. SRAC v. Theodore*.

The district court attempted to justify the deviation by deferring to the state's alleged preference "for not splitting counties outside of the metropolitan area," J.S.App. 8, and because the 1990 census was stale. J.S.App. 12. *Karcher v. Daggett*, 462 U.S. at 738, rejected a similar attempt to "explain population deviations on the basis of flaws in census data." It also held that to justify deviations based upon asserted state interests such as preserving political boundaries, a state would have to do more than rely on "general assertions." 462 U.S. at 741. The general assertions made by the district court in this case do not begin to meet the standard of specificity demanded by *Karcher* to excuse compliance with the constitutional standard of absolute population equality.

CONCLUSION

For the above reasons, this Court should reverse the decision of the lower court.

Respectfully submitted,

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
MAHA ZAKI
MARY WYCKOFF
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

ELAINE R. JONES
Director-Counsel
NORMAN J. CHACHKIN
JACQUELINE BERRIEN
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GERALD R. WEBER
AMERICAN CIVIL LIBERTIES UNION
OF GEORGIA
142 Mitchell Street, S.W.
Suite 301
Atlanta, Georgia 30303
(404) 523-6201

Attorneys for Appellants